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To: Nancy Fuller, Opinion Committee, Texas Attorney General

Company: Texas Attorney General

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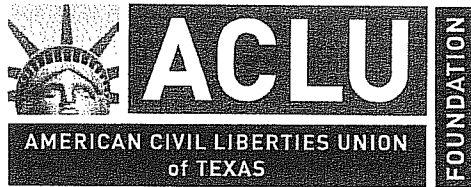
From: Frank Knaack

Number of Pages: 9 (Including cover page)

Message:

The ACLU of Texas is an affiliate of the American Civil Liberties Union, with chapters throughout the state. Sustained by a handful of paid employees and numerous dedicated volunteers, the ACLU of Texas has been in the forefront of the fight for civil liberties in this state since 1938. The ACLU of Texas works in the courts, legislatures and communities to defend, advance and enforce the individual rights and liberties guaranteed to all people protected by the U.S. Constitution and laws of the United States and the states and entities therein.

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RE: Opinion Request No. 0816-GA

October 2, 2009

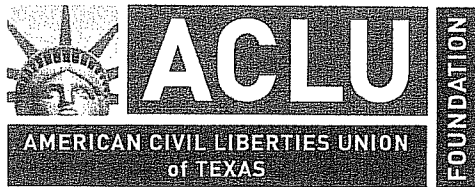
Dear Ms. Fuller,

We write to submit a third-party brief in response to the above-referenced Request for Attorney General's opinion (hereinafter "Request"). The Request was submitted by Mr. Kenneth B. Florence, Assistant District Attorney of Shelby County, Texas, who serves under District Attorney Lynda K. Russell.

The Request relates to a civil complaint filed in the Federal District Court in East Texas asserting that several defendants, including defendant Lynda Russell, participated in illegal seizures of monies that were taken pursuant to Texas's asset forfeiture law. District Attorney Russell was denied funds for her defense by Shelby County and was denied representation by the Attorney General's Office. She now seeks a clarifying opinion regarding the obligations of the county and State to pay for her legal costs, or, in the alternative, inquiring whether she may use the forfeited assets themselves to pay for her defense. Under Texas law pertaining to the disposition of forfeited assets, District Attorney Russell may not use the assets to pay for her legal defense. Second, a governmental entity must be held accountable for any constitutional violations of its representative, and therefore District Attorney Russell should receive government representation in the lawsuit.

I. STATEMENT OF INTEREST

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to defending and preserving the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States. The ACLU of Texas is the state affiliate of the national ACLU,



and has over 13,000 members. In 1999 in Tulia, TX and in 2000 in Hearne, TX, communities of color were targets of racial profiling, illegal searches, and even wrongful conviction and imprisonment resulting from unaccountable multijurisdictional drug task forces. During and following the events in Tulia and Hearne, the ACLU and the ACLU of Texas galvanized public attention and worked to pass reform measures to address such unconstitutional law enforcement practices.

The wide latitude given to local authorities by Texas asset forfeiture law has resurrected the ghosts of Tulia and Hearne, as reports come in from across Texas that local officials are disproportionately and illegally seizing the assets of African-American and Latino drivers without ever arresting them or charging them with a crime. A bill, SB 1529, was introduced in the last Texas legislative session in response to what its author identified as rampant, statewide abuse of asset forfeiture laws. The ACLU and the ACLU of Texas are deeply concerned about the pervasive nature of this problem and its disproportionate impact on communities of color. Among our other mandates, the ACLU and the ACLU of Texas work to end racial profiling and increase law enforcement and government accountability where misconduct may have or has occurred.

II. BACKGROUND AND SUMMARY

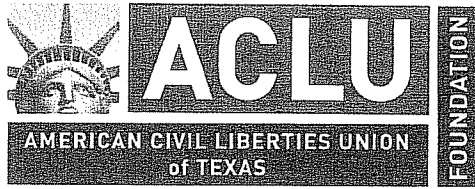
On July 24, 2008, several plaintiffs filed a civil complaint in Federal District Court in East Texas against several defendants in their official and individual capacities, including defendant Lynda Russell, who is the Shelby County District Attorney. On June 30, 2009, the complaint was amended.¹ The amended complaint alleges that plaintiffs, who are predominantly African American,² were stopped by police officers while driving in the vicinity of Tenaha, Texas, their persons and vehicles were searched without probable cause, and when cash amounts ranging from \$4000 to \$50,000 were discovered, plaintiffs were given the option of forfeiting the cash on the spot or facing arrest and prosecution for money laundering. Plaintiffs allege that District Attorney Russell participated in threatening them with prosecution if they failed to forfeit their cash assets to law enforcement.

District Attorney Russell sought representation from the county and the State. The county commissioners denied funds for her defense on the ground that the District Attorney is not a county employee as her total compensation is paid by the State of Texas.³ The

¹ The other defendants listed in the amended complaint are: City of Tenaha Deputy City Marshal Barry Washington, City of Tenaha Mayor George Bowers, Shelby County Precinct 4 Constable Randy Whatley, all in their individual and official capacities, and Shelby County District Attorney Investigator Danny Green, in his individual capacity only.

² Seven of the eight plaintiffs are African American. *See* Amended Complaint ¶¶ 20, 38, 50, 60, 73. Plaintiff Jennifer Boatwright is white, but was traveling in the company of Ronald Henderson, who is African American. *See id.* ¶¶ 73-74.

³ *See* Request at 2.



Attorney General of Texas similarly declined representation.⁴ Following this denial, District Attorney Russell sought an opinion from the Attorney General's Office, presenting four questions for review, which are summarized as follows: (1) Does the county have a duty to defend the District Attorney in a civil lawsuit arising out of the performance of her duties? (2) Is the State of Texas required to fund representation for the District Attorney when the Attorney General has refused to provide a defense? (3) May the District Attorney use asset forfeiture moneys to pay for her civil legal defense if the state and county refuse to defend and indemnify her? (4) What indemnification protections to District Attorney support staff have if they are sued civilly?

The following analysis will address the third question in detail and the government interest in answering the first or second question in the affirmative.

III. ANALYSIS

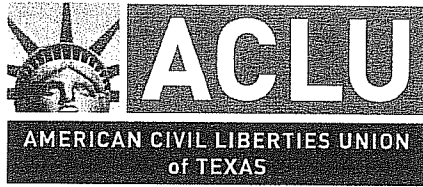
The District Attorney may not use forfeited assets for her defense. First, Texas law permits the use of forfeited assets only for "official purposes," and payment of the District Attorney's legal fees is not an official purpose. Second, forfeited assets are considered State funds under the law, and therefore, to the extent the Attorney General has determined that no state funds shall be expended on the District Attorney's defense, that determination extends to forfeited assets. Third, given that the assets are the subject of a lawsuit in which the plaintiffs claim that the assets were taken illegally by several persons, including the District Attorney, it would be improper to permit their use for the defense of the District Attorney. As a separate matter from the question of the use of forfeited assets, the District Attorney must be represented by competent government counsel.

A. Texas Law Prohibits the Use of Forfeited Assets for the District Attorney's Defense Because Such Use is Not an "Official Purpose"

Chapter 59 of the Texas Code of Criminal Procedure relates to the forfeiture of "contraband," defined as property used in the commission of certain criminal offenses. Tex. Code Crim. Proc. Art. 59.01(2). Code of Criminal Procedure article 59.06, which provides for the disposition of forfeited property, includes the following relevant provisions:

- (b) If a local agreement exists between the attorney representing the state and law enforcement agencies, the attorney representing the state may transfer the property to law enforcement agencies to maintain, repair, use, and operate the property for official purposes...

⁴ See November 10, 2008 letter from Deputy Attorney General for Civil Litigation David S. Morales, appended to District Attorney Russell's Request. No grounds for the refusal are apparent in the letter.



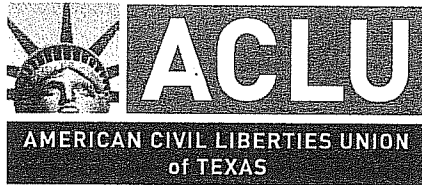
(c) If a local agreement exists between the attorney representing the state and law enforcement agencies, all money... shall be deposited... according to the terms of the agreement into one or more of the following funds:

(1) a special fund in the county treasury for the benefit of the office of the attorney representing the state, to be used by the attorney solely for the official purposes of his office

Tex. Code Crim. Proc. Art. 59.06. Article 59.06 controls and limits expenditures from the special fund. An attorney who represents the State may spend proceeds awarded to him under Chapter 59 after a submitting detailed budget listing and defining the categories of expenditures to the commissioners' court. *See id.* Art. 59.06(d). Expenditures are subject to audit by the commissioners' court. *See id.* Art. 59.06(d), (g).

The key limiting condition on the District Attorney's ability to make use of forfeited asset funds is the requirement that they be used only for "official purposes." Texas case law and Attorney General opinions are for the most part silent as to the definition of this term. However, two Attorney General opinions shed light on its scope. In 1977, the Attorney General suggested that an action taken for "official purposes" is, at minimum, one that does "not constitute the grant of a benefit to a private person." Att'y Gen. Op. No. H-1089 (1977) (finding that state-owned aircraft may be used to transport spouses and other non-office holders when "their presence on the flight furthers an official business purpose").

In a recent opinion, the Attorney General interpreted the term "official purposes" in the context of Article 59 to have a narrow definition, and limited it to those functions of the office that are expressly delineated by statute. *See* Att'y Gen. Op. No. GA-613 (2008). This opinion determined that the Harris County District Attorney could not use asset forfeiture funds to help purchase a juvenile detention facility for the county, because providing a juvenile detention facility was not an official purpose of the District Attorney's office. The opinion rejected the argument that the phrase "official purposes" should be read broadly to include any expenditure except expenditures for a private purpose. Instead, the Attorney General looked to the Texas Constitution and statutes for a definition of the official purposes of the office of District Attorney, and noted the following purposes: (1) representation of the state in criminal cases in the district courts of his district and in appeals therefrom, Tex. Code Crim. Proc. Ann. Art. 2.01; *see also Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987) (it is well established that a District Attorney's "primary function, is to prosecute the pleas of the state in criminal cases"); and (2) representing the state in district court proceedings involving children under the Juvenile Justice Code, Tex. Fam. Code Tit. §§ 51.02(11). The Attorney General found no express authorization for the provision of a juvenile detention facility in the Code, and on that ground determined that the District Attorney could not expend funds for the facility.



In this case, the brief in support of District Attorney Russell's use of forfeited assets identifies the "official purposes" requirement⁵ and argues in a conclusory fashion that "[w]hen the elected prosecutor has been sued civilly for acts done while in the performance of her official duties, it cannot reasonably be argued that the defense expenditure is anything but an 'official purpose.'"⁶ This claim may be understood in two ways. First, the brief could be arguing that it is an official purpose of the District Attorney's office to defend the District Attorney against a civil suit. Second, the brief could be arguing that, because District Attorney Russell's involvement in the seizure of forfeited assets was within the scope of her employment as a state official, defense from a lawsuit arising from that work acquires the character of an official purpose. As described below, both arguments fail.

1. *It not an official purpose of the D.A. to defend the D.A. from suit.*

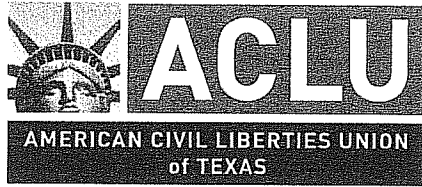
Pursuant to Texas law, "a county official or employee sued by any entity... for an action arising from the performance of a public duty is entitled to be represented by the district attorney of the district in which the county is located..." Tex. Local Govt. Code § 157.901(a). Accordingly, it is an official purpose of the District Attorney's office to defend any county official or employee. However, as explained below, the District Attorney herself is not a county official, but is instead a state official. Texas law provides that the Attorney General's Office, and not the District Attorney or a county employee, shall defend an employee or officer of the State against a civil suit. Tex. Civ. Prac. & Rem. Code § 104.004. Therefore, defense of the District Attorney is not one of the official duties of the District Attorney.

The question of whether a District Attorney is considered a state official or a county official depends on whether the actions giving rise to the claim were performed on behalf of the state or the county. *See Quinn v. Roach*, 326 Fed. Appx. 280, 292-93 (5th Cir. 2009) (citing cases finding District Attorneys to be either state or county officials in different contexts);⁷ *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997). In this case, District Attorney Russell was acting on behalf of the State when she seized assets from plaintiffs. *See Tex.*

⁵ As a preliminary matter, a District Attorney may not access any forfeited assets for any purpose unless there is an agreement between the District Attorney's office and law enforcement agencies. *See* Article 59.06(c)(1); Att'y Gen. Op. No. GA-259 ("The existence of a local agreement with a law enforcement agency primarily determines how the attorney representing the state may proceed with disposition of the property.... Without a local agreement, article 59.06(a) generally requires the property to be sold at public auction"). Anecdotal reports of past expenditures by District Attorney Russell of funds drawn from forfeited assets suggests that such an agreement was in effect.

⁶ *See* Request at 7.

⁷ The Attorney General recently found that a Criminal District Attorney was not an employee or officer of the state for the purposes of Section 104 indemnification, on the grounds that he had subsumed the role of the county attorney and his jurisdiction was limited to the county. *See* Atty. Gen. Op. GA-523. However, the application of that opinion to the case at hand is limited. First, Shelby County has a separate county attorney in addition to the office of the District Attorney. Second, the opinion relied on the Fifth Circuit's holding in *Crane v. Texas*, 766 F.2d 193, 195 (5th Cir. 1985) (a District Attorney is a county employee because he is elected locally, his power is limited to local affairs, and he is paid by the county, which is partially reimbursed by the state), which was later limited by *Quinn*, 326 Fed. Appx. at 292-93.



Code Crim. Proc. Art. 59.06 (placing the power to administer and use forfeited assets in the hands of the “attorney representing the state,” which powers were exercised by District Attorney Russell in this case). Accordingly, for purposes of this case, District Attorney Russell is a state employee.

2. *The assertion that the underlying actions were within the scope of the D.A.’s employment does not render defense from a resulting suit an “official purpose” for use of funds.*

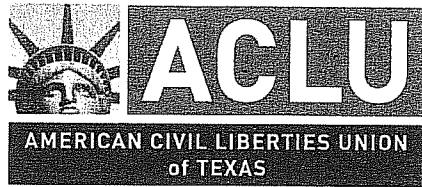
The argument that the District Attorney acted within the scope of her employment when she participated in the seizure of assets from plaintiffs does not change the analysis. Attorney General Opinion GA-613 makes clear that the term “official purpose” is to be construed narrowly to encompass only those duties enumerated by law. Whether the District Attorney incurred liability while performing her job duties does not change analysis of what constitute the official purposes of her office. Otherwise, GA-613 would have reached the opposite conclusion, and would have permitted the District Attorney of Harris County to expend funds for the juvenile detention center, on the ground that he made the request for funds while acting within the scope of his employment. Accordingly, it is clear that payment for District Attorney Russell’s defense does not constitute an “official purpose” for the use of forfeited asset funds.

B. Forfeited Assets Are State Funds

To the extent the Attorney General has determined that no state funds shall be expended on the District Attorney’s defense, such determination also prevents the expenditure of forfeited assets for that purpose. Forfeited asset funds deposited in the county treasury “have the character of state funds.” Att’y Gen. Op. No. DM-162 (citing Article 59, which states that forfeited assets become the property of the state, and forfeited property shall be administered by the attorney representing the state, acting as an agent of the state). Chapter 104 of the Texas Civil Practice and Remedies Code lays out the circumstances under which state funds shall be expended to indemnify a state employee for court costs and fees, and further states that the Attorney General “*shall*” defend a public servant entitled to indemnification under the Chapter. Accordingly, if the Attorney General denies representation, indicating a determination that state funds may not be used to indemnify a public servant, forfeited assets are similarly barred from such use.

C. The Ownership of the Assets is in Dispute

Even if it were determined that, under other circumstances, the District Attorney should be permitted to use forfeited assets to pay for legal representation, such an action in this case should be prohibited because it would give the appearance of impropriety. The forfeited asset funds are the subject of the lawsuit from which the District Attorney seeks to defend herself. The plaintiffs claim that the funds were taken illegally. To permit the District Attorney to use them would suggest that law-breakers may profit from ill gotten gains, the



very problem that the asset forfeiture law was created to prevent. Furthermore, given that the plaintiffs claim ownership of some part of the funds, to allow the funds to be dissipated during the course of the lawsuit sends a message that the case has been prejudged in the defendants' favor. Accordingly, in no event should the District Attorney be permitted to use funds drawn from forfeited assets to pay for her defense.

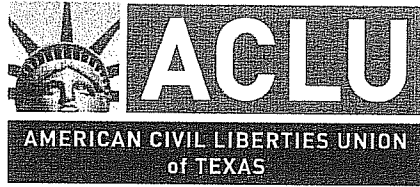
D. There Must Be Government Accountability For Officials Who Exercise their Governmental Authority to Conduct Unconstitutional Activity

Either the county or the State must be accountable for District Attorney Russell's allegedly unconstitutional actions. First, without the assurance that a governmental body is providing legal coverage, no person would stand for public office in the area of law enforcement, as the risk of incurring personal liability for constitutional violations would prove too great. Second, when government funds or empowers the activities of state actors, government must assume oversight responsibility for those actions. Third, it is in the interest of government to assume responsibility for and exert control over an employee acting in an official capacity who causes a constitutional harm, as the Texas legislature recognized when it provided "express statutory authority [in Section 104] for payment of court costs and attorney's fees in actions arising from the unconstitutional conduct of state officials." *Texas State Employees Union v. Texas Dept. of Mental Health and Mental Retardation*, 746 S.W.2d 203, 207 (Tex. 1987). By staying out of the litigation, government forfeits an opportunity to correct constitutional abuses that put state citizens at risk and that further subject government to liability. Accordingly, either Shelby County or the Attorney General's Office must assume financial responsibility for District Attorney Russell's representation.

A determination by both the county and the State that District Attorney Russell's actions are the responsibility of the other cannot forestall this conclusion. In *Crane v. Texas*, 766 F.2d 193 (5th Cir. 1985), the Fifth Circuit held that a District Attorney was a county employee for the purposes of apportioning constitutional liability to the county, based on the fact that his salary was paid by the county, his jurisdiction was local, and the alleged constitutional violation was caused by a county policy created and enforced by the District Attorney. *Id.* at 195. However, the Court made clear that its chief concern was the just apportionment of liability, not the technical identification of the District Attorney as an official of the State or the county:

But even were he a State official in every sense, called so in State law and designated by the State to make policy for its other creature, the county, our answer would likely remain the same; county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements.

Id. at 195. In this case, either the county or the State must bear responsibility for District Attorney Russell's actions, notwithstanding any disagreements they might have regarding her status as a county or State official.



IV. CONCLUSION

For the reasons set forth above, we respectfully submit that the Attorney General should hold that District Attorney Russell may not use asset forfeiture funds to pay for her defense from a civil lawsuit challenging her role in seizing those funds, and that District Attorney Russell is entitled to either county or State representation. We thank you for consideration of this brief.

Respectfully Submitted,

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